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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR PERMIT NO. 63-32576 IN THE NAME OF M3 EAGLE LLC

PROTESTANTS' BRIEF REGARDING THE MUNICIPAL PROVIDER STATUS OF M3 EAGLE

Introduction

The status of M3 as a municipal provider has been under challenge throughout these proceedings. It was first raised in October, 2008. M3 answered "requests for admissions" on or about November 24, 2008 admitting that it was not a municipal provider under any of the three (3) categories set forth in 42-202B(5)(a)(b) or (c). On May 11,2009 Protestants moved to dismiss the M3 application on those same grounds at the close of M3's case in chief under Rule 413(c). M3 could have moved to reopen its case in chief and presented evidence that it qualified as a municipal provider, but did not do so because it had no such evidence. It should be noted that M3 also failed to present any evidence concerning its financial capacity beyond the insufficient

documents attached to its application so M3 also failed to establish a prima facie case on that crucial element of their case. (See Baron v IDWR, 135 Idaho 414, 18P.3d219 (2001))

In discussing settlement negotiations involving the North Ada group and M3 it is stated that the "failure to demonstrate that it was a municipal provider" matter was raised (but apparently denied or deferred until the hearing) (p. 8 and 9 of M3 Brief). It is then stated:

> "That was the last we heard of the matter until May 11, 2009. On that day at the conclusion of M3 Eagle case in chief, Protestants offered . . . motions under Rule 413 (c) . . ."

Is this meant to infer that some underhanded tactic has been used? Hardly so! Since the case was allowed to go forward we waited until proof had been offered on the municipal provider status of M3. We did not know what that proof might be. When absolutely no evidence was presented as to the municipal provider qualifications the Eagle Pines group made the Motion to Dismiss under Rule 413 (c), IDWR Rules at the close of the applicants case in chief. This is a procedure constantly used by trial lawyers in both criminal and civil cases, approved by the courts, and authorized by both IDWR Rules and IRCP.

It should be noted that initially the Eagle Pines group and individual protestants (some of which have been defaulted out) were not even aware settlement was being considered. We never took part in any settlement negotiations, were not present, and elected not to do so as we did not want to become "a burr under the saddle" so to speak, if a settlement was reached that we could not accept.

A statement of Protestants has been misrepresented in footnote 8, p.10 of the M3 Brief. The argument was made that the municipal water right should be denied and:

> "M3 can apply for a water right, like everyone else, with a 5 year window in which to establish a beneficial use."

The plain reference here was to an ordinary water right, not a municipal one.

Statutory Language

This matter has been covered in detail in Protestants' Opening Brief and therefor only matters that need to be rebutted will be gone into here.

M3 finally concedes that it is not a municipal provider under 42-202B(5)(a) or (b) of the Idaho statute. Its only hope therefore is some theory that it qualifies under subsection (c) of that statute. To support this assertion, M3 has developed several new statutory words — first time municipal provider, non-traditional municipal provider, and uses terms like capacity to become, has the capacity, is capable, and "will" and "intent". None of those words appear anywhere in the text of Title 42, Idaho Code.

All of this is further supported according to M3 by ambiguities in Title 42-201 et. seq. (p. 8 Brief). Not one specific ambiguity is ever pointed out. Even the term qualifies is unclear as far as M3 is concerned as is its meaning being in the present tense. (Brief, p. 13).

Even under 42-202B(5)(c) present tense language appears as follows:

"(c) A corporation or association which supplies water for municipal purposes . . ."

This is the exact provision under which M3 claims to be a first-time non-traditional municipal provider.

The statute has no ambiguity and the injection of any of the new terms used by M3 would conflict with clear language of the statue which is set forth below.

> "An application proposing an appropriation of water by a municipal provider for reasonably anticipated future needs shall be accompanied by sufficient information and documentation to establish that the applicant qualifies as a municipal provider . . ." 42-202(2), Idaho Code.
>
> 42-202B(5) "Municipal provider" means:

(a) A municipality that provides water . . .
(b) Any corporation or association holding a franchise to supply water . . . or a political subdivision . . . and which does supply water . . .
(c) A corporation or association which supplies water . . .
42-202B(5)(a)(b) and (c), Idaho Code.

". . . the municipal provider shall provide to the department sufficient information and documentation to establish that the applicant qualifies as a municipal provider . . ." 42-222, Idaho Code.

"A license may be issued to a municipal provider . . . (which) satisfies the definitions and requirements specified in this chapter . . ." 42-219, Idaho Code.

There is no ambiguity in this statute. These Idaho Code sections are consistent with each other and are constant in their purpose.

Time of Licensing

Delaying the determination on the municipal provider status of an applicant until the time of licensing would not only be foolish, it would make the whole publication and protest proceeding a laughable farce. It likely would require a second round of hearings (which have already consumed 17 days), the very thing counsel for M3 rails against in their brief.

Section 42-219, Idaho Code (summarized above) is merely a restatement of the duty of the Director of IDWR to make the findings, before granting a full water right license, of those same factors already set out in prior sections of Title 42, Idaho Code. It states as follows:

"A license may be issued to a municipal provider . . . (when) the system (is) constructed . . . in accordance with the original permit provided the director determines that the . . . definitions and requirements specified in this chapter . . . (have been fully met) . . .

This provision is quite clearly designed to prevent the director from issuing a full water right license to any municipal provider who has not constructed a water system that is adequate. It is a restatement of the requirements of the other sections of Title 42, Idaho Code.

Delaying the IDWR decision until the time of licensing would only allow more attempts at developments by more providers without financial ability. This leads to more Tamarack, Avimor, and Legacy developments all of which are in serious financial trouble.

Equal Protection and other Constitutional Issues

The "equal protection clause" and other Constitutional arguments of M3 have very little merit. It is well recognized by the lower courts that Constitutional issues should be left to the higher courts to decide. This is certainly not an area that an administrative agency should involve itself in.

There is a rational and reasonable basis for the provisions of 42-201, et. seq., Idaho Code. These provisions are not only reasonable, they relate to the purpose of the legislation and the public policy of the State of Idaho regarding water appropriations. We see no violations of the Idaho Constitution.

Furthermore, allowing this first time non-traditional municipal provider as M3 now calls itself, to only have to show it is capable may create a discriminatory criteria or class that treats them better than others. (For example, a provider that must hold a franchise to supply water for municipal purposes to acquire additional water rights.) (See U.S. Constitution, Amendment 14, Idaho Constitution, article 1, section 2. Big Wood Canal Co. v Chapman, 45 Idaho 380. 263 P. 45 (1927).

M3 and the City of Eagle

M3 contends it should be considered an existing municipal provider because it has entered into an agreement with the City of Eagle to provide water. (See Brief, p. 13) That agreement is only binding on the parties and hinges on annexation. There is no such provision in the law

allowing M3 to become a tenuous existing provider entitled to a municipal water right of a future needs nature. There is no provision for M3 to step into the shoes of a municipality.

Stare Decisis

Stare decisis is an unusual doctrine which is not applied all that frequently. It absolutely does not apply in this case. The Tamarack decision is not a binding precedent. It has been held that stare decisis only applies in very limited circumstances:

> "(it) only applies to published decisions of the State's highest court." Wenks v Gekl Co., 682 N.W.2d405 (2004)

To apply stare decisis, there must have been a judicial opinion on a point of law. Where the facts or points of law are different, stare decisis does not apply.

> "For a case to be stare decisis on a particular point of law, that issue must have been raised in the action, decided and the court's decision made a part of the opinion of the case. (20 Am Jur 2d, 134, p. 517)

The legal point on which the decision is based must have been the same (People v Casper, 90 P.3d 1203 (2004). In an earlier Idaho case, Scott v Gossett, 66 Idaho 329, 158 P.2d 804 (1945) the court held as follows:

> "Stare decisis is based on the legal principal or rule involved in the prior case and not on the judgement which resulted from that case."

Stare decisis only applies where there is a decision on a legal point by the State's highest court. It does not apply in lower court decisions and certainly not to decisions of administrative agencies. Those authorities cited by M3 are only treatises and secondary authorities urging that this doctrine should apply to administrative agencies.

IDWR's Role Herein

Is IDWR being faulted for everything from construction standards for well drillers to the

guidance of the Department and the Tamarack precedent? Is a court required to lead counsel to a successful presentation of his case? No. Is IDWR required or obligated to guide counsel to a desired result in a water application? No. M3's counsel are big boys specializing in water law and they can surely read the statutes which they deal with daily and construe the statute just as Protestants have done.

It is not prudent to rely on staff administrative directions or staff memos on very complex water matters which may be written by persons who have not had any legal training. Moreover, the Tamarack case did not decide the municipal status issue and IDWR has no obligation to decide issues never brought up before it.

It should be noted that the Saxton Memo attached to M3"s Brief — specifically states:

"entities meeting the definition of a municipal provider."

Cases Cited

While many of the cases cited by M3 undoubtedly recognize dire water needs of growing municipalities none deal with planned communities and most involve the appropriation of surface water, not ground water. The City of Denver case , (surface water); Village of Peck case, (spring water); City of Pocatello case, (surface water): Soda Springs case, (purchase of surface irrigation water); (the Wyoming case cited also involved surface water.) All of those cases involved existing municipalities seeking water to supply growth, not a planned community.

Conclusion

In McNeal v Idaho P.U.C., 142 Idaho 685, 132 P.3d442 (2006), the Court noted that it must follow the law as written and said:

> "Where a statute is clear and unambiguous, the expressed intent of the legislature must be given effect."

In the Albertson case , 145 Idaho 547, 149 P.3d 822 (2006), the Court held:

"Supreme Court must construe the statute to give effect to legislative intent . . .

must be construed as a whole . . . and that the word shall is mandatory . . ."

In the Simplot case, 120 Idaho 849, 820 P.2D1206 (1991), the Court dealt with an agency entrusted to administer statutes. The Court noted as follows:

"An agency's statutory construction must be reasonable. Agency construction will

not be followed if it contradicts clear expression of the legislature."

Attachments of certified copies of the intent of the statute are made a part of this Brief. These show the spirit of the law and clear will of the legislature.

We would also again point out that the Chisholm case, 142 Idaho 159 (2005) recognized that "both the benefits and detriments" to the economy must be considered. It is speculation at this time whether M3 land will ever be annexed with Legacy on the verge of bankruptcy having millions in unpaid debt.

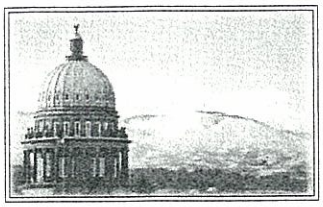
Protestants respectfully submit that a municipal water right can not be granted to M3 under the clear intent of the statue. The law must be followed as written.

Respectfully submitted this 2nd day of October, 2009.

John Thornton / David Head, Spokespersons for North Ada County Ground Water Users Association

Alan Smith, Spokesperson for Eagle Pines and individually

Norm Edwards



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CERTIFICATION OF DOCUMENTS

Kristin M. Ford, Legislative Librarian of the Legislative Services Office of the State of Idaho, and as custodian of records in the Legislative Reference Library, hereby certifies that each the following attached documents is a true and correct copy of the original record as filed in the Legislative Services Office:

Legislative History records of Senate Bill 1535 in the Second Regular Session of the Fifty-third Legislature of the State of Idaho:

1. Statement of Purpose for 1996 Senate Bill 1535 (1 page).

DATED this 5th day of August, 2009.

Kristin M. Ford
Legislative Librarian
Idaho Legislative Services Office

STATEMENT OF PURPOSE

RS 06104

The appropriation doctrine as applied throughout the western states provides flexibility for municipal providers to obtain and hold water rights needed to assure an adequate water supply for reasonably anticipated future needs. While this concept is recognized in Idaho case law, it should be further described in statutes in order to guide the actions of the Department of Water Resources, water users and the courts, and to assure that the use of this concept is appropriately controlled. The legislation seeks to define and limit the authority of municipal water providers to develop and hold water rights for reasonably anticipated future needs and to allow water to be supplied to expanding service areas. This statute addresses future licensing of water rights for municipal purposes (including those currently permitted) as well as future changes in water rights to municipal purposes. The statute does not address those licensed and decreed water rights now held by municipal providers, and the legislation intends no change in the common law with respect to such rights. Municipalities would be required to provide information to describe their service area, to establish a reasonable planning horizon, and to show that the water rights are necessary for reasonably anticipated future needs.

FISCAL IMPACT

This legislation will reduce costs to municipalities by reducing paperwork and the costs associated with additional findings. Costs to the state will be reduced by having fewer applications to change water rights and by the simplified recording and notice that will result from using the less complex descriptions for the authorized place of use. Most importantly, municipalities will be able to develop and retain at lower cost, water rights needed for expected growth.

Contact

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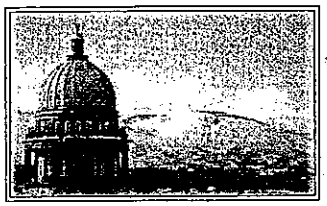

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From the Legislative History records of Senate Bill 1535 (RS 06104) in the Second Regular Session of the Fifty-third Legislature of the State of Idaho:

1. Senate Resources and Environment Committee minutes of February 21, 1996, Page 2. (1 page).

DATED this 5th day of August, 2009.

Kristin M. Ford
Legislative Librarian
Idaho Legislative Services Office

Motion by Senator Schroeder to send SJM 107 to the floor with a do pass recommendation; seconded by Senator Reed.

Roll call vote:
Ayes: Cameron, Danielson, Frasure, Hansen, Lee, Reed, Schroeder, Stennett, Whitworth and Noh.
Nays: Geddes
Absent: Richardson.
Motion carried.

S 1355 Karl Dreher, Director, Department of Water Resources, explained substitute legislation, RS 06104, which incorporates amendments to S 1355. He said the intent of the legislation is to provide flexibility for municipal water providers to obtain and hold water rights needed to assure an adequate water supply for future needs. He explained the changes between S 1355 and RS06104, noting the exclusion of geothermal water. He noted the proposed legislation defines and limits the authority of municipal water providers to develop and hold water rights for future needs and to allow water to be supplied to expanded service areas. Municipalities would be required to provide information to describe their service area, to establish reasonable planning, and to indicate water rights are necessary for future needs. He noted the proposed legislation would reduce costs to municipalities by reducing paperwork and the costs associated with additional findings. Costs to the state will be reduced by having fewer applications to change water rights and by the simplified recording and notice which will result from uncomplicated descriptions for the authorized place of us. Additionally, municipalities will be able to develop and retain water rights for future needs at a lower cost.

Upon inquiry from the Committee, Dreher said it was necessary to proceed with the legislation this year because one of the Special Masters in the Snake River Basin Adjudication is encountering problems as to the appropriate definition of municipal water right and boundaries of the municipal water right.

Chairman Noh explained if the Committee approves the new RS, it will be necessary to have the unanimous consent of the Committee to send the RS to a Privileged Committee to print the legislation or request it be sent directly to the floor.

David Mabe, representing United Water Idaho, formerly Boise Water Corporation, stated the question from the Special Master initiated the proposed legislation because there appears to be a void in the statute. The intent is to clarify by statute, rather than by ruling through the Snake River Basin Adjudication Court. He noted the Idaho Association of Cities and Idaho Water Users Association support the legislation.

Motion by Senator Reed to send RS06104 to State Affairs to be printed and sent directly to the floor with a do pass recommendation; seconded by Senator Cameron. Motion carried unanimously.

S 1489 Jo Beaman, attorney, Water Resource Coalition, explained the intent of the legislation provides for amendments to the ground water district statutes exempting districts from general election laws and allows districts to make and record diversions. Beaman informed the Committee two ground

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of October, 2009, the foregoing document was filed, served or copied as follows:

NOTICE OF SERVICE AND DISCOVERY

North Ada County Groundwater Users Association John Thornton 5264 N Sky High Lane Eagle, ID 83616	X U.S. Mail _____ Hand Delivered _____ Overnight Mail _____ Facsimile _____ E-mail
Norman Edwards 884 W Beacon Light Road Eagle, ID 83616	_____ U.S. Mail X Hand Delivered _____ Overnight Mail _____ Facsimile _____ E-mail
Jeffrey C. Fereday GIVENS PURSLEY LLP 601 West Bannock Street PO Box 2720 Boise, ID 83701-2720	_____ U.S. Mail X Hand Delivered _____ Overnight Mail _____ Facsimile _____ E-mail
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Gary Spackman, Hearing Officer State of Idaho Department of Water Resources 322 E Front Street Boise, Idaho Two part Rebuttal Brief Adam Smith	_____ U.S. Mail X Hand Delivered _____ Overnight Mail _____ Facsmile _____ E-mail